No. 73-5677

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In 1954, while a master-sergeant in the United States Army, petitioner was convicted by a court-martial of the murder of an eight year old girl, in violation of 10 U.S.C. 918. He was sentenced to death. The conviction and sentence were affirmed throughout the military system of review until the case reached the President of the United States. As required by statute (10 U.S.C. 871(a)), the President reviewed the conviction and sentence, and, in March 1960, commuted the sentence to life imprisonment, upon the express condition that petitioner "shall never have any rights * * * under the parole and suspension or remission of sentence laws of the United States * * *" (Pet. App. 21). Petitioner now contests the continued validity of the no-parole condition of the commutation in light of this Court's decision in Furman v. Georgia, 408 U.S. 238.

Petitioner is presently a prisoner at the United States Penitentiary at Lewisberg, Pennsylvania. He would be eligible to be considered for parole except for the no-parole clause of his sentence. See 18 U.S.C. 4202, 10 U.S.C. 858 (1970). He filed this action in the United States District Court for the District of Columbia seeking a declaratory judgment recognizing his eligibility to be considered for parole and an order directing the Parole Board to so consider him. The district court, before Furman, denied such relief, granting respondents' motion for summary judgment. The court of appeals, after Furman, affirmed, one judge dissenting (Pet. App. 41). We rely on the majority opinion below; we add, however, the following comments.

1. We do not believe that the condition imposed by the President has been rendered unlawful by this Court's decision in Furman. Petitioner contends that the commuted sentence is unlawful because it constitutes an "indirect adverse" consequence (Pet. 11) of the imposition of a death sentence which has been held illegal in Furman v. Georgia, 408 U.S. 238. Furman, however, has been applied retroactively only to vacate unexecuted, but otherwise operative, death sentences--that is, to prevent a person's execution. See Stewart v. Massachusetts, 408 U.S. 845; Marks v.

Louisiana, 408 U.S. 933. As the majority below thus rightly pointed out, "[t]he flaw in Schick's argument is that when the Furman case was decided he was not under a death sentence * * *" (Pet. App. 46-47). A sentence of life imprisonment without parole, which is petitioner's sentence, has not been held unconstitutional. Petitioner and the dissenting judge below also rely on the broad retroactive application which this Court has given to Gideon v. Wainwright, 372 U.S. 335, as support for applying Furman to avoid the indirect adverse consequences of the unperfected death sentence in this case, citing United States v. Tucker, 404 U.S. 443. The basis for retroactivity in the two situations, however, is not similar. The ruling in Gideon went to the integrity of the fact finding process. A conviction contrary to Gideon is deemed unreliable and thus may not be constitutionally used against a defendant for any purpose. In contrast the purpose of Furman was to put an end to the improperly discriminatory use of the death penalty, an objective so different that the Gideon retroactivity precedents simply have no material bearing on the issue here presented.

2. Petitioner further contends that his commuted sentence was unlawful because the no-parole condition was not provided by statute. As held by the court below, however, commutation of a sentence may be granted on any reasonable and lawful conditions. See Ex Parte Wells, 59 U.S. 307, 314; Hagelberger v. United States, 435 F. 2d 279 (C.A. 5), certiorari denied, 405 U.S. 925; Bishop v. United States, 223 F. 2d 582, 587-588 (C.A.D.C.), vacated on other grounds, 350 U.S. 961; Stroud v. Johnston, 139 F. 2d 171 (C.A. 9), certiorari denied, 321 U.S. 796. The commutation of the death sentence to life-imprisonment without parole eligibility was clearly reasonable and lawful in light of the nature of the crime involved. Moreover, a commuted sentence may be lawful although the terms of the sentence as commuted are not specifically described by statute for that offense. Stroud v. Johnston, supra; Ex Parte Harlan, 180 Fed. 119, 127 (C.C. N.D. Fla., 1909). 1/

The no-parole condition is clearly one known to the law. When 21 U.S.C. 176(a) was enacted as Section 106 of the Narcotic Control Act of 1956 (Act of July 18, 1956, 70 Stat. 567), Congress provided that persons convicted under that section were not to be eligible for parole. See Rivera v. United States, 318 F. 2d 606 (C.A. 9); Witt v. United States, 287 F. 2d 389, 392 (C.A. 9), certiorari denied, 366 U.S. 950. Moreover, the no-parole condition of the narcotics statute has been found constitutional in the face of claims that it is cruel and unusual punishment and a denial of equal protection of the laws. See, e.g., Sperling v. Willingham, 353 F. 2d 6, (C.A. 7), certiorari denied, 384 U.S. 962; Stewart v. United States, 325 F. 2d 745 (C.A. 8), certiorari denied, 377 U.S. 937.

Finally a refusal to set aside judicially the condition imposed by the President does not mean that the condition must

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1/ Petitioner's reliance on Biddle v. Perovich, 274 U.S. 480, is misplaced. The government in that case contended that a "commutation is the substitution of a milder punishment known to the law for the one inflicted by the court." Id. at 483. This statement does not mean that the punishment substituted must be one provided by the statute for the offense involved. Its plain meaning is that the punishment must be one recognized by the law as a valid form of punishment. Petitioner also relies on the following statement from Biddle, supra: "The only question is whether the substituted punishment was authorized by law * * *." Id. at 283. The phrase following it clearly explains that "authorized by law" means whether the change in the sentence is within the President's pardoning powers, not whether it is established by a particular act of congress.

But see In Re Walker, decided by the Supreme Court of California on February 14, 1974, in which that court, one judge dissenting, held that its decision in People v. Anderson, 6 Cal. 3d 628, holding the death penalty to violate the California Constitution, made a prior commutation to life imprisonment without parole illegal because no such penalty exists by statute under California law. We are lodging a copy of the slip opinion with the Clerk. The relevant discussions are at pages 37-42 and in the two page dissent.

remain unaltered. If there are reasons of compassion or rehabilitation that would justify further commutation of the sentence, the petitioner is free to request it of the President, and the President is free to consider the request and act upon it.

It is therefore respectfully submitted that the petition for a writ of certiorar should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.